IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

Writ Petition No.7279 of 2004

Daulat Jehangir Mehta)
(Alias Dolly), aged 92 years,)
Occ: Retired, residing at G-2,)
Flat No.2, 2nd Floor,)
Shahpoor Baug,)
Vithalbhai Patel Road,)
Mumbai - 400 007.)..Petitioner
(Org.Plaintiff)

Vs.

1. Miss Piloo Dadabhoy Broacha,)
Aged 68 years,)

2. Miss Dina Dadabhoy Broacha,)
Aged 60 years,)

3. Miss Jeroo Dadabhoy Broacha,)
Aged 64 years, Nos.1 to 3)
residing at 'A' Wing,)
'Sterling Apartments',)
G Deshmukh Marg,)
Mumbai - 400 026.)

4. Shahpur Dadabhoy Broacha,)
Aged 66 years, residing at G-2,)
1st Floor, Flat No.3,)
Shahpoor Baug, V.P.Road,)
Mumbai - 400 004.).. Respondents
(Org.Defendants)

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Shri S.I.Jayakar for the Petitioner.

Shri S.N.Vaishnav with R.D.Dave i/b M/s.N.N.Vaishnav & Co. for the respondents.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 6th SEPTEMBER, 2004.

Oral Judgment :

1. Heard. Rule. By consent, the rule is made returnable forthwith.

2. The grievance of the petitioner is that the petitioner has filed the suit and she being of 92 years of age has filed an application under Order XVIII Rule 16 of the Code of Civil Procedure, 1908, requesting for recording of her statement, as, by the time the suit may reach the stage for recording of evidence, she may not be available for recording of her evidence and that her statement is very important and necessary for just and appropriate decision in the matter. However, the same was rejected by the Court below. The petitioner, therefore, has approached this Court with a request for direction either to record her statement in exercise of powers under Order XVIII Rule 16 of the Code of Civil Procedure, 1908 or to expedite the suit and to dispose of the same in time bound programme. The learned advocate for the respondents has fairly submitted that the respondents have no objection for such expeditious disposal of the suit, however, there is no case for directing the statement of the petitioner to be recorded under Order XVIII Rule 16 of the Code of Civil Procedure, 1908.

3. The question of granting relief in the nature of expeditious disposal of a suit without ascertaining the pendency of total number of the suits before the Court below as well as the information regarding total number of the suits filed by the senior citizens, does not arise. Needless to say that considering the fact

that the petitioner is of the age of 92 years, and therefore, the suit will have to be taken up on priority basis as having been filed by the senior citizen. However, this will have to be done along with the other suits filed by the senior citizens and in chronological order.

4. The provision of law comprised under Order XVIII Rule 16 of the Code of Civil Procedure deals with the powers of the Court to examine witnesses without waiting for the suit to reach the stage of recording the evidence of the parties. Sub-rule (1) thereof provides that where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner provided in the said Code. It cannot be disputed that non-availability of a person at the time when the suit will be ripe for recording of evidence of the parties after framing of issues, could be a justifiable ground for recording the statement of such person even without waiting for the stage of recording of evidence in the suit. Obviously, non-availability of a person could be for various reasons, including the reason that the person may go beyond the jurisdiction of the Court and it may be difficult, if

not impossible, to secure his presence before the Court at later stage. There can be various other reasons including the old age coupled with serious illness. Obviously, the order allowing the party to record the statement cannot be passed in a casual manner. The party applying for the same has to make out a case for exercise of such powers by the Court and the order should be a reasoned order. The Court has to exercise its discretion in this regard judiciously.

5. In **Ram Dhir Prasad & Anr. v. Ram Sewak Lal & Anr.,** reported in AIR 1978 Patna 218, while considering the stage of Rule 16 of Order 18 of the Code of Civil Procedure, it was held that "the scope of R.16 is very wide and orders can be passed "at any time after the institution of the suit." This means that an application, in appropriate facts and circumstances, may be moved by the plaintiff even where the defendant has not filed his written statement and issues have not been framed. If the presence of the witnesses at a later stage, when the trial of the suit starts, is not going to be possible, steps may be taken under the Rule. Of course, an order for this purpose cannot be passed in violation of the principles of natural justice and provisions of service of notice by the Court in this regard is made under sub-r.(2)." I am in respectful agreement with

the view taken by the Patna High Court in relation to Order 18 Rule 16 of the Code of Civil Procedure.

6. It is to be noted that the petitioner/ original plaintiff has expressed an apprehension about her non-availability by the time the suit reaches the stage for recording of evidence. Considering age factor of the plaintiff, this is a fit case to exercise the powers under Order XVIII Rule 16 of the Code of Civil Procedure for the purpose of recording her statement without waiting for the suit to reach the stage of recording of evidence. Besides, the respondents, who are the original defendants in the suit, have already filed their written statement. Being so, the case of the plaintiff is well known to the defendants so also the case of the defendants is known to the plaintiff. In the circumstances, therefore, the trial Court would be well justified in exercising the powers under Order XVIII Rule 16 of the Code of Civil Procedure to record the statement of the plaintiff, i.e. examination-in-chief as well as the cross-examination, without waiting for the suit to reach the stage of recording of evidence and at the earliest possible.

7. The petition is accordingly allowed. The trial Court is directed to record the statement of the plaintiff, i.e. examination-in-chief as well as cross-examination and the re-examination, if any, as

expeditiously as possible and without waiting for the suit to reach the stage of recording of evidence. Needless to say that the suit also will have to be expedited along with the other suits filed by the senior citizens. Rule is made absolute accordingly with no order as to costs.

8. Parties be given an authenticated copy of this order.